PUBLIC LAW Journal
An Official Publication of the State Bar of California Public Law Section
Vol. 27, No. 1
Winter 2004

MCLE SELF-STUDY

AVOIDING THE SIGN CODE SHAKEDOWN: A CHECKLIST OF BASIC PROVISIONS

*By Donald M. Davis, Esq.**

Although the past few years have not given rise to any major California or Ninth Circuit sign law cases,[1] that has not stopped outdoor advertising companies and their lawyers from mounting legal challenges against local sign regulations ("sign codes") that have not kept abreast of prior changes in the constitutional landscape. At least six Southern California cities have recently found themselves in federal court fending off what public lawyers have come to characterize as the "sign code shakedown."[2]

The plaintiffs in these cases have followed the same script: negotiate leases with private property owners in a jurisdiction with outdated sign regulations; apply for multiple billboard permits, knowing that they will be denied due to noncompliance with the regulations; immediately sue the agency to invalidate the sign code on *unrelated* grounds based on precedent from other federal circuits and non-sign law cases; and, finally, attempt to convince the court to order issuance of permits for billboards in the otherwise prohibited or restricted locations, or negotiate a similar deal with the victim agency in exchange for a waiver of an attorney fees claim.[3] The deficiencies alleged in these sign code shakedowns generally include: (1) failure to directly advance a substantial government interest; (2) favoring commercial speech over noncommercial speech; (3) undue burdening of fundamental methods of communication; (4) favoring particular groups or speakers; and (5) lack of adequate procedural safeguards.

A comprehensive review of every potential pitfall in drafting sign regulations is beyond the scope of this article.[4] However, every public lawyer and planner responsible for sign regulations should be aware of these five issues and ensure that they are adequately addressed.

I. STATEMENT OF PURPOSE

Most sign regulations are primarily directed at signage located on commercial properties. Because that signage typically contains a commercial message, the regulations must pass the intermediate scrutiny test ("Commercial Speech Test") established in Central Hudson Gas & Electric Corp. v. Public Service Comm'n.[5] Under that test, a local agency first must affirmatively demonstrate that its regulations: (1) seek to implement a substantial governmental interest; and (2) directly advance that interest.

Since most commercial signs are either affixed to buildings (e.g., a wall sign) or are free standing structures (e.g., monument signs, pylon signs and billboards), local agencies typically include sign regulations within their zoning regulations, and California law expressly deems them as such.[6] As with other structures, the primary concerns of local agencies with respect to signage involve the physical appearance of the sign and its placement. The United States Supreme Court has held as a matter of law that "traffic safety" and community "appearance" are "substantial government goals" that justify regulation of commercial signage.[7] While aesthetic and safety interests

Inside this Issue

PUBLIC LAW JOURNAL
www.calbar.org/publiclaw

EDITOR
Terence R. Boga
tboga@rwglaw.com

ASSISTANT EDITORS
Herschel T. Elkins & Armando J. Olvera

DESIGN & PRODUCTION
Documation, LLC
www.documation.com

SUBMISSIONS

We solicit original manuscripts, which should be limited to 2,500 to 3,000 words. Authors should provide sufficient information to permit adequate identification in the publication. The editorial staff reserves the right to edit submitted manuscripts as necessary. Edited manuscripts will be sent to authors for approval only where extensive revision might affect an article's substance. Strict publication deadlines do not allow time to send proof to authors. Manuscripts should be sent to Terence Boga, 355 S. Grand Avenue, 40th Floor, Los Angeles, CA 90071 Ph: (213) 626-8484, Fax: (213) 626-0078, E-Mail: tboga@rwglaw.com.
In most cases, we can grant reprint permission to recognized professional organizations. Inquiries regarding subscriptions, etc., should be addressed to Tricia Horan, State Bar of California, 180 Howard Street, San Francisco, CA 94105. Ph: (415) 538-2223 or E-mail: Tricia.Horan@calsb.org

DISCLAIMER

The statements and opinions here are those of editors and contributors and not necessarily those of the State Bar of California, the Public Law Section, or any government body.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered and is made available with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

Public Law Section Roster

– Executive Committee Roster –

CHAIR
Fazle Rab G.D. Quadri
quadri@mdaqmd.ca.gov
Victorville

VICE-CHAIR
William R. Selgimann
bill@southbaylaw.com
Los Gatos

SECRETARY
Peter E. von Haam
Peter.vonHaam@doj.ca.gov
Los Angeles

TREASURER
James F. Rupp, Jr.
jfruppjr@goldenwave.com
Oxnard

IMMEDIATE PAST CHAIR
Stephen L. Millich
smillich@simivalley.org
Simi Valley

MEMBERS
Brenda Aguilar-Guerrero
Oakland

Jeffrey G. Bennett
Ventura

Terence R. Boga
Los Angeles

Betty A. Downing
Los Angeles

Herschel T. Elkins
Los Angeles

Augustin R. Jimenez
Sacramento

Armando J. Olvera
Diamond Bar

Mark G. Sellers
Thousand Oaks

Larry A. Thelen
Fair Oaks

Kirk E. Trost
Sacramento

Charles J. Williams
Martinez

Rosemarie L. Zimmerman
Daly City

– Advisors –

Manuela Albuquerque
Berkeley

Ricarda L. Bennett
Thousand Oaks

Joyce M. Hicks
Oakland

Jeremy G. March
Encino

Henry D. Nanjo
Sacramento

Michelle Whitaker
Bakersfield

Michael R. Woods
Sonoma

John K. Chapin
Oakland
C.E.B. Liason

Terry Miller, Ph.D.
Sacramento
Legislation Advisor

Larry Doyle
Sacramento
Sections Legislative Representative

Tricia A. Horan
San Francisco
Manager of Sections

Thomas Pye
San Francisco
Section Coordinator

Pamela Wilson
San Francisco
Director of Sections

are inherent in virtually all sign codes, the regulations of a surprising number of local agencies still fail to explicitly recite any permutation of these interests. The result can be invalidation of the entire sign code.[8]

To avoid this scenario, the first section of every sign code or adopting ordinance should contain a statement of purpose that, at minimum, recites the agency's interests in community aesthetics and traffic safety as grounds for the regulations.[9] A recitation stating that the regulations are intended to advance community design and safety standards in related legislation, such as the general plan or adopted architecture guidelines, is also recommended.[10] So long as a sign code's statement of purpose delineates substantial interests in aesthetics and traffic safety, the agency does not have to make a factual showing that the sign regulations will in fact advance those interests in order to pass this part of the Commercial Speech Test.[11]

Nevertheless, to discourage the slight of hand utilized by sign code shakedown artists who can cite numerous cases where "tangible" evidence was required by courts (but for distinguishable government interests),[12] it is a good idea when adopting or amending a sign code to have planning staff prepare a report discussing how the regulations have resulted in, or with proper enforcement should result in, more attractive signage and an overall improvement of the local aesthetic environment. Such a report could include photographs of recent signage compared with older, nonconforming signs. Even the most jaundiced judicial eye should be able to see how the general movement away from billboard, pole or pylon signs towards low-profile monument and wall signs has reduced visual clutter and improved the aesthetics of communities.

Alternatively, the United States Supreme Court has approved the practice of a local agency relying on the reports or studies of another agency along with judicial precedent that it reasonably believes to be relevant when adopting regulations that attempt to address the "secondary effects" (i.e., aesthetics and traffic safety) of protected First Amendment conduct.[13] Therefore, if an agency lacks the resources to prepare an independent report on aesthetic or safety concerns,[14] consideration should be given to obtaining a report or study used by another jurisdiction, or at least citing in the adopting legislation some of the leading federal and state cases addressing relevant sign regulations.

II. EQUAL OPPORTUNITY FOR NONCOMMERCIAL SIGNS

Noncommercial speech has always been entitled to full First Amendment protection. On the other hand, the extension of First Amendment protections to purely commercial speech is a relatively recent development. It was not until 1975 that the United States Supreme Court declared that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection.[15] Since then, the court has afforded commercial speech a measure of First Amendment protection "commensurate" with its position in relation to other constitutionally guaranteed expression.[16]

Because commercial speech is not accorded equal status with noncommercial speech, sign regulations cannot favor commercial speech over noncommercial speech.[17] Unfortunately, many local agencies still have not incorporated into their sign codes the lessons learned by the cities of San Diego and Moreno Valley. The former sign codes of these respective cities were overbroad and therefore held constitutionally deficient in that they permitted onsite commercial messages, but, with a few limited exceptions, did not permit noncommercial messages, which are accorded a greater degree of protection.[18]

The sign codes of many local agencies continue to inadvertently end up with this same result by generally defining "sign" in a manner that favors commercial speech (e.g., "any device that is used: (1) to advertise enterprises, products, goods, services, or otherwise promote the sale of objects or identify objects for sale; (2) to identify, to direct, or to inform persons concerning enterprises, areas, entities, services, or dangers; or (3) to attract attention to the premises or other signs of a particular enterprise or entity"). Assuming that the same code also contains a provision that prohibits any "sign" not designated in the code, this flaw then pervades the entire regulatory scheme since the signs permitted under such code technically can say "All Sofas 10% Off" but not "Save The Whales."

In response to this sort of unintended consequence, local agencies have found a simple solution – the "substitution clause." In essence, this provision states that any noncommercial message may be substituted for the copy of any commercial sign allowed under the sign code.[19] The Ninth Circuit has found a sign code containing a substitution clause to be "content neutral" because the provision allowed any sign that could be erected under the code to carry a noncommercial message, and therefore it did not restrict noncommercial speech more than commercial speech.[20] To avoid claims of favoritism towards commercial signage, all sign codes should contain a substitution clause or its functional equivalent.

III. TEMPORARY NONCOMMERCIAL SIGNS

A decade ago, the United States Supreme Court put local agencies on notice that it is unconstitutional for regulations to prohibit homeowners from displaying small, temporary signs with political or other noncommercial messages on their property.[21] The court noted that temporary yard or window signs carrying noncommercial messages are a cheap, convenient and fundamental form of communication that should not be entirely foreclosed.

Yet today, many sign codes fail to properly address this issue. As with favoritism towards commercial speech, this is typically a result of inadvertence. For example, a sign code may not specifically state that temporary political or noncommercial signs are permitted, particularly on residential property. Yet elsewhere, the code has a provision to the effect that "no sign is permitted except as expressly provided in this code." The net effect of this oversight is a ban on such temporary noncommercial signs. Alternatively, many sign codes allow temporary "campaign" signs (e.g.,"Vote for Candidate Sanchez"), but the narrow definition of this type of sign frequently and improperly precludes the posting of broader political or noncommercial messages such as "Stop Global Warming." Sign code drafters and reviewers should make sure that their codes provide opportunities for these minor but fundamental methods of communication, subject to whatever reasonable size, number and durational requirements the agency deems appropriate.[22]

IV. USE-BASED DISTINCTIONS

Litigants often allege that a sign code violates the Equal Protection Clause because certain businesses or groups are "favored" in the types of signage permitted. For example, a sign

code may allow larger signs for enterprises located inside a shopping center than it does for those located directly on a street. These types of allegations generally miss the mark, since such distinctions are not based on the message of the speaker but on the *use* of the property. To pass constitutional muster the agency must simply have a rational and legitimate basis for making these types distinctions.[23] In this case, the visibility of a store within a shopping center may be more affected by physical conditions such as distance due to surrounding parking lots and other set backs. Alternatively, certain types of establishments may have particular signage needs such as a "menu board sign" for a drive-through restaurant. By allowing a particular sign structure where it is needed as opposed to where it is not, a local agency is simply furthering its stated interest in reducing visual clutter and enhancing aesthetics. Neither the Ninth Circuit nor any California Court of Appeal has ever struck down a sign code on equal protection grounds and, based on a growing body of cases from other jurisdictions, it appears unlikely that a court would sustain such a challenge provided there is a rational basis for making such distinctions in the sign code.[24]

With respect to regulations that identify certain types of commercial signs by their content (e.g., "construction signs," "real estate signs," and "subdivision sales signs") such regulations should likewise not be found to run afoul of the Constitution. These provisions are not an attempt to censor speech or enforce regulations based on viewpoint.[25] In fact, such signs have no viewpoint, they merely relate to factual information.[26]

Still, many sign codes contain provisions that appear to lack a rational basis for allowing certain groups but not others a particular type of sign. Common examples involve signage for non-profit, charitable or religious institutions. Why should a church be permitted a "changeable copy sign" but not a hotel that has a conference center? Both uses involve assembly of persons for meetings or events. In these situations where the uses are similar, it is clearly preferable to regulate based on usage rather than the user. For instance, the sign code could provide that changeable copy signs are permitted for any property use where the assembly of a designated number of persons is permitted and occurs on a regular basis.[27] This achieves the desired result without appearing to single out certain groups for preferential treatment.

V. PROCEDURAL SAFEGUARDS

The failure to include a time limit for the processing of a sign application, or for the review of the denial of an application, has not been decided in the context of sign regulations by either the United States Supreme Court or the Ninth Circuit.[28] This dearth of authority has not stopped sign litigants from attempting to extend into the sign law realm "prior restraint principles" developed in other contexts. For example, the Ninth Circuit has held that a decision to issue or deny a permit for constitutionally protected expressive activities (e.g., erotic dancing) must be made within a "brief, specified and reasonably prompt period of time" and that a public entity must also provide for "prompt judicial review" of the denial of a permit.[29] Given that the law is unsettled in this area, and the fact that these types of procedural protections are commonplace for other sorts of permits, there is little reason for local agencies not to enhance the processing provisions of their sign codes to address these issues.[30]

A sign code that vests officials with "complete" discretion to deny a sign permit on the basis of ambiguous or overly subjective reasons is likely to be invalidated. For example, an ordinance that allowed the denial of a permit if the structure or sign will have a harmful or detrimental effect upon the "health or welfare of the general public" or the "aesthetic quality of the community," was found to grant "unbridled discretion" to city officials and violate the First Amendment.[31] This is because when a permit scheme is "completely discretionary, there is a danger that protected speech will be suppressed impermissibly because of the government officials . . . distaste for the content of the speech."[32] However, conferral of discretion on officials does not render a regulatory scheme invalid *per se* under the First Amendment.[33] The fact that a permitting scheme vests *some* discretion in government officials does not lead to the conclusion that such discretion is "unfettered." The United States Supreme Court has upheld permit guidelines that allowed the reviewing officials "considerable discretion."[34] Moreover, the court has stated "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[35] Where grounds are reasonably specific and objective, and do not leave the decision "to the whim of the administrator," they will be upheld.[36]

How then to craft such criteria? To the extent possible, with the exception of certain inherently discretionary aesthetic issues such as colors or compatibility with adjacent structures, most approval criteria in a sign code should be "ministerial" type standards pertaining to size, height and illumination. There should also be language to the effect that the decision maker's determination is guided solely by the criteria set forth in the code, and that an application must be approved whenever the proposed sign conforms to the code.[37] This type of language, along with largely ministerial standards, should discourage claims that agency officials have unbridled discretion.

CONCLUSION

It is perhaps not surprising that many sign codes continue to suffer from neglect given the sometimes conflicting court decisions, the clout of affected constituencies such as business owners, and the burdens imposed by state laws such as California's requirement that before a local agency can enact more restrictive regulations affecting on-site signs, the agency must: (1) inventory all illegal or abandoned on-site signs under its existing law and (2) hold a public hearing to review the inventory.[38] Therefore, if this article does not prompt local agencies to review their sign codes before they find themselves the victim of a sign code shakedown, perhaps some solace can be found in a recent decision reaffirming the ability of local government to moot lawsuits by amending the challenged regulations.[39]

ENDNOTES

1. In Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), the seminal decision regarding the regulation of signage, the United States Supreme Court emphasized that the broad principles of the First Amendment must be tailored to address the unique forum of expression: "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." Id. at 501. The court subsequently observed: "While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that

legitimately call for regulation." City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994). As such, cases involving the regulation of signage ("sign law") cannot always be lumped together with other First Amendment cases such as those involving the regulation of adult businesses or the issuance of parade permits.

2. The affected jurisdictions include the cities of Chula Vista, Gardena, Industry, Lemon Grove, San Diego and South Gate. The term "sign code shakedown" was coined by Randal R. Morrison, Esq., who maintains a useful website devoted to sign law issues: signlaw.com.

3. See Granite State Outdoor Adver. v. City of Clearwater, 213 F.Supp.2d 1312 (M.D.Fla. 2002) and Granite State Outdoor Adv., Inc. v. Town of Orange, 303 F.3d 450 (2nd Cir. 2002). These cases involve the same Georgia-based attorney, E. Adam Webb, now of Porter & Webb L.L.C., who is behind the California cases referenced in note 2 above. See also Atlanta Journal Constitution, "Lawyer Fights For Billboards," July 28, 2003, Section A1 (available online at www.ajc.com/business/content/business/0703/28billboards.html.)

4. See Granite State Outdoor Adver., supra note 3 at 1328 (describing the task of drafting constitutional sign regulations as the proverbial "catch-22").

5. 447 U.S. 557 (1980) .

6. Cal. Gov.C. § 65850(b).

7. Metromedia, supra note 1 at 507-508. See also National Advertising Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988).

8. Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814, 819 n.2 (9th Cir. 1996) ("Had the City enacted the ordinance with a clear statement of purpose indicating the City's interest in eliminating the hazards posed by billboards to pedestrians and motorists and in preserving and improving its appearance, the City would have demonstrated that the ordinance sought to implement substantial governmental interests, and would thus have satisfied the first prong of the [Commercial Speech Test].")

9. See Santa Clarita Municipal Code ("SCMC") § 17.19.010. The SCMC is available online at www.santa-clarita.com/cityhall/admin/code/. The author recently assisted Santa Clarita in amending its sign regulations and they are cited here for reference purposes only.

10. SCMC § 17.19.010(B).

11. Metromedia, supra note 1 at 509-510 (refusing to second guess the "common-sense judgments of local lawmakers and of the many reviewing courts" that signs, particularly billboards, "are real and substantial hazards to traffic safety" and can constitute aesthetic harm). See also Ackerley Communications of Northwest v. Krochalis, 108 F.3d. 1095, 1097-1100 (9th Cir. 1997).

12. Such cases include Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (interest in protecting minors from tobacco products) and Edwards v. City of Coeur d'Alene, 262 F.3d 856 (9th Cir. 2001) (interest in minimizing potential physical violence in demonstrations by regulating hand-held objects).

13. Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002).

14. Traffic studies are more difficult to develop. In Metromedia, the Department of Justice, as an amicus curiae, submitted as evidence a report prepared by the Federal Highway Administration: Wachtel, J. and Netherton, R.D, "Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage," U.S. Department of Transportation, Federal Highway Administration, Report No. FHWA/RD-80/051, June 1980. More recent studies include Bergeron, J., "An Evaluation of the Influence of Roadside Advertising on Road Safety," prepared for the Minstere des Transports, Government of Quebec, April 1996.

15. Bigelow v. Virginia, 421 U.S. 809, 825 (1975).

16. Lorillard, supra note 12 at 559. Just exactly how commensurate with noncommercial speech the protections for commercial speech must be remains in limbo following dismissal of certiorari this past term of Nike, Inc. v. Kasky, 123 S.Ct. 2554 (2003).

17. Metromedia, supra note 1 at 514; Desert Outdoor Advertising, supra note 8 at 819-20.

18. Metromedia, supra note 1; Desert Outdoor Advertising, supra note 8.

19. See SCMC § 17.19.040(C) and (D).

20. Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 612 (9th Cir. 1993)

21. City of Ladue, supra note 1 at 48.

22. See SCMC § 17.19.230; see also City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F.Supp. 52 (N.D. Cal. 1982) (striking down preliminary time period imposed on campaign signs); and Candidates' Outdoor Graphic Serv. v. City and County of San Francisco, 574 F.Supp. 1240 (N.D. Cal. 1983) (upholding 11-inch height restriction on campaign signs).

23. See generally Isbell v. City of San Diego, 258 F.3d 1108, 1116 (9th Cir. 2001).

24. See Granite State Outdoor Adver., supra note 3 at 1340; Infinity Outdoor, Inc. v. City of New York, 165 F.Supp.2d 403, 422-23 (E.D.N.Y. 2001); and Outdoor Media Dimensions, Inc. v. State of Oregon, 945 P.2d 614, 624-626 (1997).

25. See City of Los Angeles, supra note 13 at 449 (J. Kennedy concurring) (ordinance may identify speech based on content, but only as a shorthand for identifying the secondary effects).

26. See Granite State Outdoor Adver., supra note 3 at 1336.

27. See SCMC § 17.19.190(B).

28. See Outdoor Systems, Inc., supra note 20 at 613; Onsite Advertising Services v. City of Seattle, 134 F.Supp.2d 1210 (W.D.Wash. 2001).

29. Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998).

30. See SCMC §§ 7.19.060(C) and (D) and 17.19.260.

31. Desert Outdoor Advertising, supra note 8 at 818.

32. Young v. City of Simi Valley, 216 F.3d. 807, 819 (9th Cir. 2000).

33. Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989).

34. Id.

35. Id.

36. Thomas v. Chicago Park District, 534 U.S. 316, 324 (2002).

37. See SCMC § 17.19.060(D).

38. Cal. Bus. & Prof. C. § 5491.

39. Federation of Adver. Ind. Rep. v. City of Chicago, 326 F.3d 924 (7th Cir. 2003).

* Donald M. Davis (ddavis@bwslaw.com) is a partner with Burke, Williams & Sorensen, LLP. He serves as the Assistant City Attorney for the cities of Camarillo and Industry, and has assisted a number of cities in updating their sign codes.

MCLE SELF-ASSESSMENT TEST

1. Commercial speech has always been afforded First Amendment protection.

❑ True ❑ False

2. Regulations that affect commercial speech are subject to strict scrutiny.

❑ True ❑ False

3. The adoption of sign regulations by ordinance in California is subject to the same procedural requirements as a typical zoning ordinance.

❑ True ❑ False

4. A local agency must always provide tangible evidence that sign regulations further a community's interest in traffic safety in order to pass muster under the United States Supreme Court's test for commercial speech regulations.

❑ True ❑ False

5. An agency may rely on the reports or studies of another agency when adopting regulations that address secondary effects of signage such as aesthetic and traffic impacts.

❑ True ❑ False

6. The constitutional protections afforded commercial speech are equal to those afforded noncommercial speech.

❑ True ❑ False

7. The failure to state a substantial government interest in a sign code or its adopting legislation could be a fatal defect that results in the invalidation of the entire sign code.

❑ True ❑ False

8. A sign code cannot favor noncommercial speech over commercial speech.

❑ True ❑ False

9. Large billboards are a fundamental method of communication that cannot be prohibited by a local agency.

❑ True ❑ False

10. If a sign code restricts commercial speech more than noncommercial speech, a substitution clause must be included as part of the code.

❑ True ❑ False

11. Local agencies cannot place size, number or durational restrictions on political signs.

❑ True ❑ False

12. Any sign regulation based on the content of the sign is per se unconstitutional.

❑ True ❑ False

13. To avoid equal protection challenges, it is better to regulate signage based on the use of property as opposed to the user of the property.

❑ True ❑ False

14. The Ninth Circuit has expressly held that decisions on sign permit applications must be made within a reasonably prompt period of time.

❑ True ❑ False

15. If the criteria to be followed by a decision maker acting on a sign permit application are reasonably specific and objective they will probably be upheld.

❑ True ❑ False

16. Prior restraint principles prevent sign code administrators from exercising any discretion over the approval of a sign permit application.

❑ True ❑ False

17. The United States Supreme Court is poised this term to clarify its prior rulings regarding distinctions in the level of scrutiny applied to regulations affecting commercial and noncommercial speech.

❑ True ❑ False

18. Once a legal challenge is brought against a sign code, a local agency should not amend the regulations until ordered to do so by a court.

❑ True ❑ False

19. An agency must inventory all of its illegal or abandoned off-site signs before it can enact stricter regulations pertaining to off-site signs.

❑ True ❑ False

20. The holdings of cases involving protected First Amendment conduct unequivocally apply to the regulation of signage.

❑ True ❑ False

MCLE CREDIT

Earn one hour of MCLE credit by reading the article on pages 1-5 and answering the above questions, choosing the one best answer to each question. Mail your answers and a $20 processing fee (no fee for Public Law Section members) to:

Public Law Section
State Bar of California
180 Howard Street
San Francisco, CA 94105

Make check payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks.

CERTIFICATION

The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education. This activity has been approved for minimum continuing legal education credit in the amount of 1 hour.

Bills To Watch in 2004

*By Brenda Aguilar-Guerrero and Mark Sellers**

AB 18, LENO

Topic: Public employment discrimination.
Last Action: In committee. Hearing postponed by committee.

Summary: An act to amend Sections 19572 and 19702 of the Government Code, relating to public employment discrimination. The State Civil Service Act provides that unlawful discrimination by a state employee, against the public or other employees while acting in the capacity of a state employee, is a cause for discipline. This bill would remove disability from the bases of discrimination to which this provision applies, but would, instead, include gender, sexual orientation, physical disability, medical condition, and mental ability. The Act also prohibits any person from being discriminated against on various grounds. This bill would also include gender, sexual orientation, age, and medical condition within the grounds of discriminatory conduct to which this provision applies.

AB 406, JACKSON

Topic: Environmental Quality - CEQA
Last Action: In Senate. Read first time. To Com. on RLS for assignment.

Summary: An act to amend Sections 21089 and 21160 of, and to add Section 21099 to, the Public Resources Code, relating to environmental quality. CEQA permits a lead agency to charge and collect a reasonable fee from a project applicant in order to recover estimated costs incurred by the lead agency in preparing a negative declaration or an environmental impact report for the project and for the procedures necessary to comply with CEQA on the project. This bill would specifically authorize a lead agency also to charge and collect a reasonable fee from the project applicant to cover estimated costs incurred by the lead agency in preparing a draft environmental impact report or mitigated negative declaration.

AB 1189, WIGGINS

Topic: Public contracts.
Last Action: Read first time.

Summary: An act to add Chapter 1.9 (commencing with Section 1900) to Part 1 of Division 2 of the Public Contract Code, relating to public contracts. This bill would enact the "California First" Procurement Act to express the intent of the Legislature that California-based business bidders have precedence over non-California based business bidders in the application of any bidder preference for which non-California based business bidders may be eligible.

AB 1582, KORETZ

Topic: Abusive work environments.
Last Action: Referred to Coms. on L. & E. and JUD (03/10/2003).

Summary: An act to add Part 12 (commencing with Section 9200) to Division 5 of the Labor Code, relating to employment. This bill would make it an unlawful employment practice to subject an employee to an abusive work environment, as defined, and would specify that an employer, as defined, is vicariously liable for a violation committed by its employee, but would prescribe certain affirmative defenses. The bill would also make it an unlawful employment practice to retaliate against an employee because the employee has opposed an unlawful employment practice under the bill or has made a charge, testified, assisted, or participated in an investigation or proceeding under the bill. The bill would specify that it is enforceable solely by a private right of action, would authorize injunctive relief and would limit an employer's liability for emotional distress to $25,000 where the unlawful employment practice does not result in a negative employment decision, as defined. The bill would provide that an aggrieved employee may elect to seek compensation under the bill or the employee's workers' compensation remedy, but may not accept workers' compensation and bring an action under the bill for the same underlying behavior.

AB 1617, MONTANEZ

Topic: Harassment: Investigations.
Last Action: In committee; hearing postponed by committee.

Summary: An act to amend Section 12940 of the Government Code, relating to employment discrimination. This bill would specify the reasonable steps an employer should take to investigate allegations of harassment and to prevent harassment, including, among other things, using a trained and experienced investigator, taking corrective action that effectively disciplines the harasser and does not adversely affect the victim, and reviewing whether any prior corrective action had been effective.

SB 163, ALARCON

Topic: Service Contracts.

Summary: Authorizes counties and cities to contract for services if they meet 10 conditions and allows for contracting out by cities and counties when any of 7 conditions are met. SB 163 would explicitly apply to all cities and counties, including those that have merit or civil services systems but excludes charter cities and counties from its provisions. SB 163 has several other exclusions from its provisions, i.e., contracts for architectural and engineering services, public transit services.

SB 293, BRULTE

Topic: Development Fees.

Summary: Limits the location where local officials can finance services with a Mello-Roos Act special tax to the territory that is subject to the special tax. Further provides that if local officials impose a Mello-Roos Act special tax on property, or on development

activity, the local officials cannot deny the development activity based on the applicant's refusal to join the community facilities district.

SB 360, ROMERO

Topic: Public Works: Prevailing Wages: Exclusions.

Summary: This bill would revise these exclusions by specifying that these housing projects are excluded from the prevailing wage requirements if those projects are funded by specified government financing requirements on or before December 31, 2004.

SB 532, ROMERO

Topic: Environmental Quality: Cumulative Effects.

Summary: Would amend CEQA by expanding what is to be included in an EIR, requiring EIR's to specify the significant cumulative effects on the environment, and to include a determination of whether or not there is a reasonable possibility that the project or its cumulative effects would pose a significant risk to public health. If a reasonable possibility exists, then a risk assessment must be performed to ascertain the risk to human health.

SB 744, DUNN

Topic: Affordable Housing Projects.

Summary: Existing law requires each city, county, or city and county to adopt a general plan with a housing element that assesses the communities' housing constraints and share of regional housing needs. This bill would have the state Department of Housing and Community Development hear appeals of city, county, or city and county decisions on applications for the construction of housing developments that meet specified affordability requirements.

SB 864, HOLLINGSWORTH

Topic: Redevelopment.

Summary: SB 864 would delete the reference to a lack of necessary commercial facilities that are normally found in neighborhoods as an economic condition that causes blight.

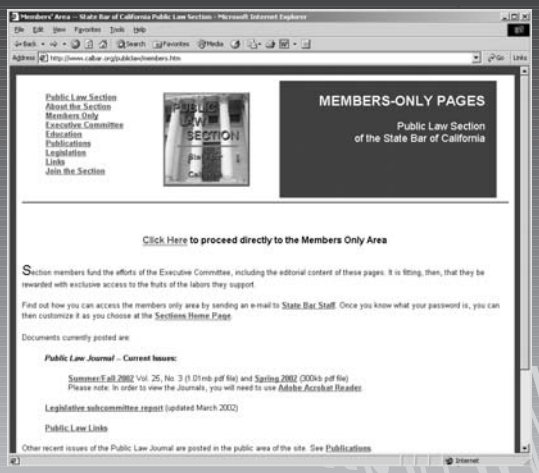
SB 1037, SHER

Topic: Subdivisions.

Summary: Consolidates existing Subdivision Map Act recommendations concerning proposed subdivisions in any adjoining city, or in any adjoining unincorporated territory provided the proposed subdivisions are within three miles of the exterior boundary of the requesting local agency, thus permitting local subdivision ordinances to provide for cable television systems and communications systems, including, but not limited to, telephone and Internet services to each parcel in all subdivisions.

* Brenda Aguilar-Guerrero (BAGuerrero@ebhw.com) is a member of Erickson Beasley, et al. Mark Sellers is the former City Attorney of the City of Thousand Oaks. Ms. Aguilar-Guerrero and Mr. Sellers are members of the Public Law Section's Executive Committee and comprise its Legislative Subcommittee.

MEMBERS ONLY WEB PAGE ACCESS



- Updated reports of the Public Law Section's Legislative Subcommittee on pending state legislation
- Public Law Journal Archives
- Public Law Internet Links
- Notes of developments of interest to section members

To access these pages, point your browser to www.calbar.ca.gov/publiclaw and click on the link to the Member's Area. When you are asked for your password, use your State Bar number as both your user ID and your password.

We recommend that you immediately change your password. To do so, follow the link on the Member's Area page. If you have any difficulty, send a message to publiclaw@hotmail.com. Send your ideas for additional members-only features to the same address.

The Brown Act and the Role of the Elected Official, the City Attorney, and the District Attorney

*By Julia Sylva, Esq.**

No meetings behind closed doors. That is the basic rule of the Ralph M. Brown Act (the "Act").[1]

Why is this simple concept a frequent topic of debate, misunderstanding, and confusion? The reasons are many. Term limits have dramatically changed the landscape of local government. Our more experienced public officials, upon the end of their term, move up to higher office, leaving vacancies that are filled by more inexperienced individuals who have never held public office. These newly elected public officials may have never encountered the concept that official city business must be conducted in the open; they are not familiar with the nuances of the Act. Alternatively, we may have some public officials who *are* familiar with the Act, but don't want the public to know about the governmental decisions they are making and are intentionally seeking to circumvent the Act. Maybe the debate, misunderstanding and confusion are a combination of these possibilities. Regardless, we have a constant flow of public officials who need to understand this important concept.

This article is an attempt to assist city councilmembers, newly elected or not, understand the applications of the Act. We will also discuss the obligations of the city attorney to advise regarding, and of the district attorney to enforce, the Act. Please note that "city councilmembers" and "city" may be used interchangeably with any other public officials and public entities governed by the Act (i.e., the commissioner, the board member, the school district, the community college district, the water district, etc.).

Democracy possesses its benefits and burdens. To live in a democracy we must discharge responsibilities inherent in a democracy, and in so doing, perpetuate principles of freedom. Although the Act may be inconvenient for some of us, it allows us to function as a democratic society.

I. ELECTED OFFICIAL'S ROLE

Public officials are held to a higher standard than private citizens. The standards imposed upon public officials are primarily to serve and act in the best interests of the community, to protect the public trough, and to avoid decisions that are self-dealing. Newly elected public officials who have not yet been sworn into office are also subject to the Act; they may not meet with a quorum and conduct business of the public without meeting the requirements of the Act.[2]

A. Key Definitions - Meetings

Generally, the Act requires meetings of "legislative bodies" of local public agencies (i.e., city councils) to be open and public.[3] The city council may conduct official business only through the participation of a quorum. A quorum of a public body is 50% plus one.

A "meeting" includes any congregation of a quorum of the city council at the same time and place to hear, discuss, or deliberate upon any item that is within its subject matter jurisdiction. No vote or action is required for the gathering to be a "meeting", nor must the members meet face-to-face to conduct a "meeting."[4] There are several exceptions to the meeting definition, and these include attendance at ceremonial or social functions, as well as attendance at seminars or conferences open to the public where issues of general interest are discussed.[5]

B. Seriatim Meeting Prohibition

City council decisions generally may not be made by a quorum *outside* of a public meeting such that a vote by the body at the public meeting is merely perfunctory. With the exception of authorized teleconferencing, the Act prohibits any use of direct communication, personal intermediaries, or technological devices by a quorum of the city council to develop a collective concurrence as to action to be taken on an item outside of a public meeting—even if that action is to table an agenda item![6]

C. Rights of the Public

At *regularly* scheduled city council meetings, the public must be given an opportunity to address the council before or during consideration of any matter described in the agenda and for items not on the agenda. At *special* meetings, the city council is required to provide members of the public only sufficient time to discuss those items on the special meeting notice.[7] It is a common practice among cities to require members of the public to fill out a speaker's card in order to address the city council.[8] Recently, the Court of Appeal ruled that the public entity only needs to provide for one *general* public comment period at each session of a continued public meeting held to consider a *single* published agenda (continuances and multiple meetings were contemplated by the Act and only one *general* public comment period is required per agenda).[9]

The city must provide to the public on request "copies of any contracts, settlement agreements, or other documents that were finally approved . . . in closed session."[10] Additionally, writings that are distributed to all or a majority of the city council generally must be made available to the public on request.[11]

D. Late-Breaking Agenda Items

The city council may not discuss or take action on an item if it is not posted on the

agenda. However, at regular meetings, late-breaking items may be added to the agenda, provided a super-majority (two-thirds vote or unanimous vote if less than two-thirds of the members are present) of the city council determines that: (1) there is need to take action immediately, and (2) the need for action came to the attention of the city after the agenda was posted.[12]

The late-breaking agenda item exception does *not* apply to special meetings. If a matter is not listed on the special meeting agenda, there cannot be discussion or action on it; however, conferring with and giving direction to staff does not constitute "action taken" for the purposes of the Act.[13]

E. Closed Sessions

The city does not lose all of its rights to make sensitive decisions behind closed doors. The Act provides several exceptions to its open meeting requirement. The primary exceptions, where a city council may meet in closed session, are the following: real estate negotiations;[14] pending litigation (existing or anticipated);[15] and personnel matters.[16]

During a closed session, the city council may or may not take action or vote on an issue. However, if the city council takes action and votes on a particular issue in closed session, it must publicly report the vote or abstention of every member present.[17]

If the action taken is to pursue litigation (initiate, defend, appeal, join amicus curiae), or is to finalize a settlement, the city council must report the details of the litigation in open session at the public meeting during which the closed session is held. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action or the defendants, but shall specify that the direction to initiate or intervene in an action has been given and that the action and the defendants, once formally commenced, shall be disclosed to any person upon inquiry, unless to do so would jeopardize the city's ability to effectuate service of process, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.[18]

The city council, at its option, may keep a minute book of closed session discussions. The closed session minute book is not a public record and is not subject to public inspection. However, the closed session minute book may be subject to inspection by court order.[19]

II. CITY ATTORNEY'S ROLE

A. Who is the Client?

The city attorney does not work for any individual member of the city council or staff member of the city. The city attorney's client is the municipal corporation—the city, which includes the public. Government Code Section 41801 states: "The city attorney shall advise the city officials in all legal matters pertaining to city business." The role of the city attorney may be further defined in a particular municipal code.

B. Attorney Client-Privilege

The city attorney is also governed by the Rules of Professional Conduct of the California State Bar which provide, among other things, that the "relation between attorney and client is a fiduciary relation of the very highest character and binds the attorney to most conscientious fidelity ...."[20] Additionally, Business and Professions Code Section 6068(e) provides that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

C. Proactive City Attorney

It is advisable for the city attorney to take a proactive role in educating city council members regarding the provisions of the Act. It is also advisable for the city attorney to keep abreast of the changes in the Act by attending minimum continuing legal education (MCLE) courses. A well-informed city attorney and a well-educated city council will prevent many misunderstandings and misinterpretations of the Act. In practice, the city attorney should make every effort to render legal opinions, including an analysis of the consequences, regarding any potential violations of the Act.

III. DISTRICT ATTORNEY'S ROLE

Some critics claim that the Act "lacks teeth." However, the Act clearly sets forth regulatory and enforcement powers and provides criminal and civil penalties for violation of its provisions.

A. Statutory Remedies

The Act provides that each individual member of the city council who attends a meeting in violation of any of its provisions may be guilty of a misdemeanor.[21]

The district attorney or any interested person may commence an action for the purpose of stopping or preventing violations or threatened violations of the Act by members of the city council, or to compel the city council to tape record its closed sessions, which may be subject to discovery or disclosure. However, communications protected by the attorney-client privilege remain protected.[22]

Additionally, after a demand to "cure or correct" is made, and ignored by the city council, the district attorney or any interested person may commence a suit to invalidate an action taken by the city council in violation of the Act.[23]

A court may award court costs and attorney fees to the plaintiff in an action brought to enforce the Act. Alternatively, a court may award court costs and attorney fees to a defendant in any action brought to enforce the Act, where the defendant has prevailed in a final determination of such action and the court finds that the action was "clearly frivolous and totally lacking in merit."[24]

B. Los Angeles' Public Integrity Division

In January 2001, the Office of the District Attorney, County of Los Angeles, created a Public Integrity Division ("PID"). Its goal is to "increase the public's level of confidence in its elected and appointed officials." The PID is responsible for, among other things, enforcing all violations of the Act. The PID has adopted an extensive "Brown Act Complaint Protocol," which provides guidance to its deputies in enforcing the Act.

In the event of non-compliance, after a "cure and correct" or warning letter has been issued, the Protocol reminds the deputies that:

"[A]lthough Section 54959 subjects only

members of the agency to misdemeanor prosecution, under Penal Code Section 31, aiders and abettors would also be liable. Non-agency members who conspire with agency members to violate the Brown Act would also be liable for a felony prosecution under Penal Code Section 182 ...."

As a last resort, the Protocol sets forth the form of misdemeanor complaint and proposed jury instructions.

According to Susan Chasworth, Deputy District Attorney, PID, "the primary goal of this office is to have all local legislative bodies comply strictly with the Act." Since formation, the PID has reviewed over one hundred complaints for alleged violation of the Act and has not had to file any criminal complaints; the PID has been able to achieve voluntary compliance.

CONCLUSION

In reality, we may all take an interest in implementing the Act—the community-at-large, the members of the city council, the city manager, the city attorney, the district attorney and, of course, the press. Conducting local government business in this manner provides the checks and balances of a democracy and allows us to experience the freedoms we hold in high esteem. Adherence to these moderate provisions will serve to insure a society where wrongs are restrained and rights are protected. Ultimately, the Act makes those who govern at the local level more accountable and responsive to the people they serve.

ENDNOTES

1. Cal. Gov.C. § 54950 et seq.
2. Id. § 54952.1.
3. Id. § 54953.
4. Id. § 54952.2(a).
5. Id. § 54952.2(c).
6. Id. § 54952.2(b).
7. Id. § 54954.3(a).
8. Cf. *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990).
9. See *Chaffee v. San Francisco Library Commission,* (1st Appellate Dist., Div. 2, Case No. A102550A, Filed 1/29/04)
10. Cal. Gov.C. § 54957.1 (b).
11. Id. § 54957.5(a).
12. Id. § 54954.2(b)(2). See *Cohan v. City of Thousand Oaks,* 30 Cal.App.4th 547 (1994).
13. See *Boyle v. City of Redondo Beach,* 70 Cal.App.4th 1109 (1999).
14. Cal. Gov.C. § 54956.8.
15. Id. § 54956.9.
16. Id. § 54957.
17. Id. § 54957.1(a).
18. Id.
19. Id. § 54957.2.
20. *American Airlines, Inc. v Shepard Mullin, Richter & Hampton,* 96 Cal.App.4th 1017, 1040-1044 (2002).
21. Cal. Gov.C. § 54959.
22. Id. § 54960.
23. Id. § 54960.1.
24. Id. § 54960.5.

* Julia Sylva (julia@juliasylva.com) is President/CEO of the Law Offices of Julia Sylva, A Law Corporation, practicing municipal law, real estate, land use and zoning, redevelopment law, small business and corporate law (including nonprofits) and estate planning. Ms. Sylva was the first woman and the youngest elected councilwoman to the City Council, City of Hawaiian Gardens, served as Mayor (2 terms), Vice-Mayor, and as a Member of the Board of Directors of the Hawaiian Gardens Redevelopment Agency (1976-1980). Ms. Sylva continues to serve as a volunteer on many boards and organizations. She was appointed by the Senate Rules Committee to the Commission on Technology in Learning of the State of California (1999 to 2001) and by the Governor to the Law Revision Commission of the State of California (2002 to 2003). She is a Member of the Los Angeles County Citizen's Economy and Efficiency Commission (appointed in 1993 to present), serves on the Executive Committee and Chairs the Task Force on Economic Development. She is the founder of the Inner-City Internet and Franchise Foundation, a nonprofit organization committed to closing the gap in the digital divide. She is a member of the Mexican American Bar Association; the National Women's Political Caucus, L.A. Metro (Founding Member); and a former member of the California State Bar, Public Law Section, Executive Committee (1994-1997). She is a graduate of Loyola Law (1983).

The Legislature SLAPPs Back: S.B. 515

By T. Peter Pierce, Esq.*

In 1992, California's Legislature acknowledged "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[1] These lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), were thus targeted for early dismissal through the procedures set forth in Code of Civil Procedure Section 425.16. The anti-SLAPP statute authorizes defendants to file a special motion to strike any cause of action "against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."[2]

Newly armed with the anti-SLAPP statute's potent provisions, including the instruction that its terms "shall be construed broadly,"[3] defendants in a wide variety of lawsuits counter-attacked with motions to strike. But many creative defendants sought to extend the statute's boundaries. Not surprisingly, the number of published appellate decisions defining and sharpening the parameters of the statute has grown correspondingly as some courts have applied the statute in surprising contexts, and others have rebuked defendants for misusing the law.[4]

The Legislature has responded to this proliferation of case law with S.B. 515 (Kuehl), which adds Section 425.17 to the Code of Civil Procedure effective January 1, 2004. The measure begins with an acknowledgement of "a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for redress of grievances, contrary to the purpose and intent of Section 425.16."[5] Section 425.17 establishes exemptions for plaintiffs in certain lawsuits to combat meritless anti-SLAPP motions. The scope of the relief provided by Section 425.17 appears to have been driven, at least in part, by judicial construction of the anti-SLAPP statute.

I. PUBLIC INTEREST EXEMPTION

Section 425.17 exempts from the reach of anti-SLAPP motions two broad categories of lawsuits. The first category encompasses certain actions "brought solely in the public interest or on behalf of the general public."[6] In order to qualify for the exemption, (1) the plaintiff must "not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member;" (2) the action, if successful, must "enforce an important right affecting the public interest, " and "confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons;" and (3) private enforcement must be "necessary and place[] a disproportionate financial burden on the plaintiff in relation to plaintiff's stake in the matter."[7] These three criteria virtually mirror those contained in California's "private attorney general" statute.[8] That statute is most commonly used by plaintiffs to recover attorney's fees after prevailing in litigation against public agencies.

The Legislature's exemption of "public interest" actions from the reach of the anti-SLAPP statute is perhaps a response to precedent permitting public agencies to strike lawsuits brought against them. For example, in Schroeder v. City Council of the City of Irvine,[9] the plaintiff sought a declaration that Irvine illegally funded an organized effort to increase voter participation and registration. The plaintiff's complaint alleged that the city's "Vote 2000" program was really intended to campaign for the passage of a ballot initiative, and not simply to bring voters to the polls. Irvine and its city council filed an anti-SLAPP motion to strike the complaint. The trial court granted the motion and the appellate court affirmed. The appellate court observed that "at least two cases have permitted government agencies and officials to use the anti-SLAPP statute to dismiss lawsuits against them."[10] More broadly, the court commented: "[a]lthough we do not categorically hold that all lawsuits against governmental agencies and officials automatically qualify for treatment under section 425.16, the particular facts of this case justify adhering to the parties' theory that the statute applied."[11]

The "public interest" exemption in Section 425.17 significantly undermines the ability of defendant public agencies and officials to file anti-SLAPP motions to dismiss lawsuits against them. Had this exemption existed at the time the Schroeder case was decided, the outcome probably would have been different. Public agencies and officials served with lawsuits filed on or after January 1, 2004 should carefully examine and then apply Section 425.17(b) to the allegations before deciding whether to file an anti-SLAPP motion to strike the complaint. If an anti-SLAPP motion is filed, the plaintiff most likely will have the burden in opposing the motion to show that the exemption applies to defeat the motion.[12]

Plaintiff public agencies and officials should note that the new protection afforded to public interest actions does not impact their ability to *defend against* anti-SLAPP motions. A longstanding provision of the anti-SLAPP statute precludes the use of anti-SLAPP motions to dismiss litigation initiated by public agencies: "The section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor."[13] Last year, in City of Long Beach v. California Citizens for Neighborhood Empowerment,[14] the court rejected the argument that this provision is limited to criminal proceedings and held that it applies to civil enforcement actions brought by a government entity in its own name.[15] Other courts, including the California Supreme Court, also have upheld actions filed by government entities against anti-SLAPP motions.[16]

II. COMMERCIAL REPRESENTATION EXEMPTION

Perhaps not as germane to public agencies, but nevertheless significant, is the second broad category of actions now exempt from dismissal under the anti-SLAPP statute: actions "brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or

conduct by that person."[17] To qualify for this exemption, (1) the challenged statement or conduct must consist of a factual representation about the person's or a competitor's business, goods or services that is made to obtain approval for, promote, or secure the sale of the person's goods or services, or the statement or conduct must be made in the course of delivering the goods or services; and (2) the intended audience must be an actual or potential customer, or a person likely to repeat the statement to or influence an actual or potential customer, or the statement or conduct must arise out of or within the context of a regulatory approval process, proceeding or investigation (with one narrow exception for telephone companies).

The Legislature's exemption of these "commercial representation" actions is consistent with a series of recent appellate decisions rejecting attempts by purveyors of goods and services to invoke the anti-SLAPP statute against consumer actions. In Consumer Justice Center v. Trimedica Int'l, Inc.,[18] the court held that an action arising from a company's literature touting its herbal breast enhancement product was not subject to the anti-SLAPP statute. A similar action challenging a company's product labels and internet listing of the ingredients in its nutritional and dietary supplements also was deemed outside the scope of the statute.[19] In Commonwealth Energy Corp. v. Investor Data Exchange, Inc.,[20] the court rejected an anti-SLAPP motion in an action challenging a telemarketing pitch promoting a company's investigative services for a fee. Most recently, the court in Jewett v. Capital One Bank,[21] upheld against an anti-SLAPP motion a class action complaint challenging as fraudulent the "pre-approved" credit offered by Capital One Bank.

In each of these four cases, the courts found that the activities of the defendants did not arise from acts in furtherance of constitutional rights of petition or free speech. Under the new anti-SLAPP exemption for "commercial representation" actions, these courts would have been spared that analysis in the first place; the complaints would almost certainly now be categorically exempt under Section 425.17(c) from the reach of the anti-SLAPP statute.

III. MISCELLANEOUS PROVISIONS

In addition to removing two broad categories of lawsuits from anti-SLAPP attack, S.B. 515 reinforces the anti-SLAPP statute's application to other types of actions. Persons sued because of statements made or ideas expressed in any book or academic journal, or in "any dramatic, literary, musical, political, or artistic work," including movies and televisions programs, still may use the anti-SLAPP statute to turn the tables on their adversaries.[22] Certain nonprofit organizations also enjoy anti-SLAPP protection even if actions against them fall into one of the two new categorical exemptions.[23]

Section 425.17 works a slight change in the rules for appealing an order on an anti-SLAPP motion. An order granting an anti-SLAPP motion still is immediately appealable.[24] Before Section 425.17 took effect, all orders denying anti-SLAPP motions also were immediately appealable.[25] Now, however, orders denying anti-SLAPP motions on the ground that Section 425.17 exempts the plaintiff's action from anti-SLAPP scrutiny, are *not* immediately appealable.[26] In those cases, the plaintiff's action will move forward on the merits in the trial court. If the plaintiff prevails, the defendant may of course challenge the denial of its anti-SLAPP motion as part of any appeal from the judgment. The only other recourse for a defendant whose anti-SLAPP motion has been denied under Section 425.17 is to file in the court of appeal a petition for a writ of mandate or other extraordinary relief seeking an order setting aside the trial court's denial of the motion and instructing the trial court to grant the motion. Petitions for extraordinary relief filed in the court of appeal are rarely granted.

CONCLUSION

In the end, Section 425.17 at least clarifies that certain types of actions are exempt from the reach of the anti-SLAPP statute. But much like the anti-SLAPP statute, the language of Section 425.17 leaves room for argument whether its provisions apply in any number of factual circumstances that may arise. The next ten years no doubt will generate the same magnitude of litigation regarding the scope of the new anti-SLAPP exemptions as the last decade has generated regarding the scope of the anti-SLAPP statute itself.

ENDNOTES

1. Cal. C.C.P. § 425.16(a).
2. Id. § 425.16(b)(1).
3. Id. § 425.16(a).
4. E.g., Paul for Council v. Hanyecz, 85 Cal.App.4th 1356 (2001) (court rejected argument that illegally laundered campaign contributions arose from acts in furtherance of constitutionally protected conduct).
5. Cal. C.C.P. § 425.17(a).
6. Id. § 425.17(b).
7. Id.
8. Id. § 1021.5.
9. 97 Cal.App.4th 174 (2002).
10. Id. at 183 n. 3.
11. Id.
12. On its face, Section 425.17 is silent regarding who bears the burden of showing whether the exemption applies; the statute simply declares that certain "public interest" actions are exempt. It is reasonable to conclude, however, that the party seeking to invoke the exemption – the plaintiff – carries the burden of showing its application. That conclusion is consistent with the precedent holding that defendants seeking to invoke the anti-SLAPP provisions in Section 425.16 have the burden of showing that the provisions apply to the plaintiff's complaint in the first place. Equilon Enterprises v. Consumer Cause, Inc., 29 Cal.App.4th 53, 67 (2002).
13. Cal. C.C.P. § 425.16(d).
14. 111 Cal.App.4th 302 (2003).
15. Id. at 308-309.
16. See City of Cotati v. Cashman, 29 Cal.4th 69 (2002); Santa Monica Rent Control Bd. v. Pearl Street, LLC, 109 Cal.App.4th 1308 (2003); City of San Diego v. Dunkl, 86 Cal.App.4th 384 (2001).
17. Cal. C.C.P. § 425.17(c)
18. 107 Cal.App.4th 595 (2003).
19. Nagel v. Twin Laboratories, Inc., 109 Cal.App.4th 39 (2003).
20. 110 Cal.App.4th 26 (2003).
21. 113 Cal.App.4th 805 (2003).
22. Cal. C.C.P. § 425.17(d).
23. Id.
24. Id. § 425.16(j).
25. Id.
26. Id. § 425.17(e).

* T. Peter Pierce (ppierce@rwglaw.com) is a shareholder of Richards, Watson & Gershon in the Los Angeles office. Mr. Pierce has handled numerous anti-SLAPP cases in the California trial and appellate courts.

Join The Public Law Section

Use this application form. If you are already a member, give it to a partner, associate, or friend.
Membership will help you SERVE YOUR CLIENTS and SERVE YOURSELF now and in the future.

NAME

FIRM & ADDRESS

CITY ZIP

TELEPHONE E-MAIL

STATE BAR NO. YEAR OF ADMISSION

MY PRIMARY AREAS OF INTEREST ARE:

OR: ❑ ENROLL ME AS AN ASSOCIATE MEMBER OCCUPATION:

I have enclosed my check for $60 payable to the State Bar of California for a one-year membership in the Public Law Section. (Your canceled check is acknowledgement of membership.)

Signature Date

If paying by Credit Card:

Cardholder's Signature Account Number Expiration Date

COPY AND MAIL TO:

Section Enrollments
Public Law Section
The State Bar of California
180 Howard Street
San Francisco, CA 94105

❑ Enclosed is my check for $60 for my annual Section dues payable to the State Bar of California. (Your cancelled check is acknowledgement of membership.)

❑ Credit Card Information: I/we authorize the State Bar of California to charge my/our VISA/MasterCArd account. (No other card will be accepted.)

PUBLIC LAWYER OF THE YEAR AWARD 2004

Do you know a public law practitioner who deserves special recognition because of outstanding services to the public?

If so, that person could be the recipient of the Public Law Section's "2004 Public Lawyer of the Year" award because of your nomination.

Each year the Public Law Section honors a public lawyer selected by the Public Law Section Executive Committee from nominations sent in by members of the Public Law Section, the State Bar, and the public at large.

For the award, the Public Law Section Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. At least 5 years of recent, continuous practice in public law.
2. An exemplary record and reputation in the legal community.
3. The highest ethical standards.

Rather than a political figure or headliner, the ideal recipient would be a public law practitioner who has quietly excelled in his or her public service. Just as the Public Law Section Executive Committee supports the goal of ethnic diversity in the membership and leadership of the State Bar, a goal in selecting the 2004 Public Lawyer of the Year will be to ensure that the achievements of all outstanding members of the Bar who practice public law, especially women and people of color, are carefully considered.

Nominations are now being accepted. The 2004 Public Lawyer of the Year award will be presented at the Annual State Bar Convention in Monterey in October 2004.

Send nominations, no later than 12:00 midnight, June 1, 2004, to:
Tricia Horan, Public Law Section, State Bar of California, 180 Howard Street, San Francisco, CA 94102-4498

To nominate an individual for this award, fill out the official nomination form below.

Nominee's Name:

Nominator's Name: **Place of Business:**

Telephone Number: **Years of Public Law Practice:**

Brief statement why Nominee deserves recognition:

A Message from the Chair

*By Fazle Rab Quadri, Esq.**

Let me invite you to add a little more excitement - consider participating in one of several Public Law Section activities. But first look at what a few of your fellow public lawyers have accomplished as volunteers. Apart form communications and fellowships, PLS members provided speakers for three MCLE programs at the Sections Education Institute in Santa Monica. Again this year, we co-sponsored the annual UCLA Extension's Land Use Law and Planning Conference in Los Angeles and we also were a sponsor of the 2004 City Attorneys Continuing Education Program in San Jose.

Apply for Appointment to Executive Committee: Your Public Law Section is anticipating five vacancies on the Executive Committee and needs your application. Membership on the committee is quite rewarding, spiritually and intellectually, if not monetarily. The committee meets four times during the year and, while there is no salary attached to your service, you are reimbursed certain expenses according to State Bar travel policies. You can download the standard application form from the Bar web site. This year the Executive Committee will consider applications on April 3rd and make its appointment recommendations to the Board of Governors for the term starting at the close of the State Bar annual meeting. I am looking forward to seeing your application.

Contribute an Article for Publication: You are invited to write an article for publication in the Public Law Journal. Terence Boga, editor of the Journal, is always looking for fellow public lawyers to contribute an article on a legal topic of prevailing interest. You do not get paid for your article, but you do get all the bragging rights along with several copies of the Journal to give to your adversaries and admirers.

Become a Speaker for a MCLE Program: Your Section actually receives a few pennies for each person who attends the MCLE programs that we sponsor. Betty Ann Downing, Vice-Chair of our Education Subcommittee, hopes that at the 2004 Bar annual meeting we will have the maximum number of programs that a Section may sponsor, which is likely to be ten. If you have expertise in an area and want to share your knowledge, please submit a short (say less than fifty words) description of the proposed program and names of speakers. The Executive Committee will evaluate the proposals, establish priority and recommend sponsorship to the State Bar. If you know a subject well, you will know it even better after you have been the speaker at an MCLE program.

* Fazle Rab G. D. Quadri (quadri@mdaqmd.ca.gov) is General Counsel of the Mojave and Antelope Air Quality Management District in southern California. He is Chair of the Public Law Section Executive Committee.

PUBLIC LAW JOURNAL
State Bar Education Foundation
Public Law Section
180 Howard Street, San Francisco, CA 94105-1639